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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1071 OF 2002

Sudhbir Punamchand Parakh — Appellant

versus

Punamchand Dalichand Parakh and others — Respondents

Mr.M.C.Shah i/by Ajay K. Rao for appellant.

Mr.G.S.Godbole for respondent nos.6 to 9.

CORAM : A.S.OKA, J.

DATE : 22nd March 2007

JUDGMENT :-

1. Heard Shri Shah, learned counsel appearing for the appellant and Shri Godbole, learned counsel for the respondent nos.6 to 9. The appellant is the original plaintiff in a suit for partition and separate possession. The appellant-plaintiff claimed 1/4th undivided share in the suit properties which are described in Schedules I, II and III annexed to the plaint.

2. An application for temporary injunction was

made at Exhibit-5 against first to firth respondents (original first to fifth defendants) restraining them from transferring, selling, parting with suit properties or dealing with or creating any encumbrances or creating any third party rights in any manner till the disposal of the suit. There was one more application made by the appellant at Exhibit-38 for temporary injunction. The application at Exhibit-5 has been rejected by the judgement and order dated 4th October 2002 passed by the Trial Court which is the subject matter of challenge in this Appeal from Order. The application at Exhibit-38 filed by the appellant-plaintiff was allowed by order dated 4th October 2002 by granting temporary injunction against first and second defendants restraining them from making any kind of construction on the suit property at serial numbers 1 and 2 described in Schedule-I to the plaint.

3. It appears that the plaint was subsequently amended by the appellant-plaintiff by adding the defendant nos.6 to 12. In the amended plaint it was asserted that the first to fifth defendants have sold the properties mentioned at serial numbers 2,3 and 4 of Schedule-I to the plaint to

defendant nos.6 to 12 by executing various documents. By the amendment, prayers were incorporated for a declaration that the sale deeds, deeds of declaration and deeds of apartment executed by the first defendant in favour of defendant nos.6 to 9 and 10 to 12 are void ab-initio and were not binding on the appellant. By the amendment, a decree for possession was also prayed for in respect of the properties mentioned at serial numbers 2,3, and 4 of Schedule-I to the plaint.

4. The learned Trial Judge while passing the impugned order has observed that an ex-parte ad-interim order was passed on 26th November 1999 by which the first to fifth defendants were restrained from creating any third party interests. The learned Trial Judge has observed that in view of the transfer of plot nos.5, 6 and 7 described in Schedule-I made by the first to fourth defendants on 28th January 1999, prayer clause (a) of application at Exhibit-5 has become infructuous. The prayer clause (b) in application at Exhibit-5 was for temporary injunction restraining the first to fifth defendants from interfering with the properties in possession of the appellant-plaintiff. The

learned Judge held that as even according to the plaintiff, the properties were joint family properties and, therefore, the injunction as prayed in prayer clause (b) cannot be granted.

5. The learned counsel appearing for the appellant submitted that the learned Trial Judge ought to have granted temporary injunction against the respondents. He submitted that pending a suit for partition and separate possession, the defendants cannot be allowed to create third party interests.

6. When it was brought to the notice of the learned counsel for the appellant that in the application at Exhibit-5 only first to fifth defendants were parties and injunction was prayed as against the said defendants, he stated that the appellant will take out a separate application for claiming appropriate interim relief as against defendant nos.6 to 12 who were subsequently impleaded as party defendants to the suit.

7. Shri Godbole appearing for respondent nos.6 to 9 submitted that as there was no prayer made against the said respondents, even if the appeal

is allowed, no interim relief can be granted as against the said respondents. He submitted that the respondent nos.6 to 12 have acquired the properties in question before institution of the suit.

8. I have considered the submissions. As indicated earlier, after the plaint was amended and the defendant nos.6 to 12 were added, the corresponding amendment was not carried out to application at Exhibit-5 and only first to fifth defendants continued to be parties to the said application. Initially an ad-interim order was passed restraining the defendants (first to fifth) from creating any third party interests in respect of the suit properties. A perusal of the impugned order shows that the learned Trial Judge has observed that when an ex-parte ad-interim injunction was granted on 26th November 1999, the prayer clause (a) of the application at Exhibit-5 had become infructuous. He has not rejected the prayer clause (a) made in Exhibit-5 on merits. So far as rejection of prayer clause (b) is concerned, it is difficult to find fault with the learned Trial Judge as even according to the appellant-plaintiff the properties which are subject matter of the suit are joint family

properties.

9. A perusal of the amended plaint shows that the appellant has prayed for possession of the immovable properties mentioned at serial nos.2, 3 and 4 in Schedule-I to the plaint. Thus, even according to the case of the appellant-plaintiff, now the added defendants seem to be in possession of the properties at serial numbers 2 to 4 of Schedule-I to the suit. Therefore, insofar as the said properties are concerned, now it is not necessary to grant any injunction as against first to firth defendants. Insofar as other suit properties are concerned, the injunction as prayed in prayer clause (a) of Exhibit-5 will have to be granted against first to fifth defendants. It is not necessary to make any adjudication upon the rights of the added defendants as the appellant has not prayed for any interim relief against them before the Trial Court in the application at Exhibit-5 which is the subject matter of this appeal. As stated earlier, the appellant has stated that he will take out a separate application for interim relief as against the added defendants.

10. Therefore, the impugned order dated 4th

October 2002 will have to be quashed and set aside and a limited injunction will have to be granted against first to fifth defendants in respect of the properties except the suit properties at serial nos.2 to 4 at Schedule-I to the plaint. Hence, I pass the following order.

11. ORDER :-

(a) The impugned judgement and order dated 4th October 2002 is quashed and set aside;

(b) First to fifth defendants (first to fifth respondents herein) are restrained by an order of temporary injunction till the final disposal of the suit from creating any third party interests or from transferring in any manner the suit properties except the properties at serial nos.2 to 4 at Schedule-I to the suit;

(c) Prayer clause (b) of application at Exhibit-5 stands rejected;

(d) It is made clear that no adjudication has been made in this appeal as regards the claim of the appellant as against defendant nos.6 to 12 and the contentions raised by defendant nos.6 to

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12;

(e) In view of disposal of the appeal, the interim order passed in the appeal stands vacated;

(f) All contentions of the parties in the pending suit are expressly kept open;

(g) No orders as to costs.

(A.S.OKA, J.)